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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of:

1998 Biennial Regulatory Review  
Streamlining of Mass Media Applications,  
Rules, and Processes

MM Docket No. 98-43

Policies and Rules Regarding  
Minority and Female Ownership of  
Mass Media Facilities

MM Docket No. 94-149

To: The Commission

PETITION FOR RECONSIDERATION

The Milwaukee Area Technical College District Board ("MATC"), by its attorneys, and pursuant to Section 1.429 of the FCC's Rules, petitions for reconsideration of the Commission's *Report and Order* in MM Docket Nos. 98-43 and 94-149, FCC 98-281 (released November 25, 1998) ("*Report and Order*"), insofar as the decision modifies the Rules relating to construction permits extensions. As shown below, the new Rules do not adequately accommodate the legitimate need of existing permittees for a process to extend CPs in situations where construction is substantially underway or nearly complete, where such construction was diligently pursued, and where the expiration of the CP because of the hard and fast three-year rule will cause undue disruption and harm the public interest.

MATC is licensee of noncommercial educational television stations WMVS, Channel 10, and WMVT, Channel 36, both in Milwaukee, Wisconsin. In 1994, MATC submitted

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applications (File Nos. BPET-940610KF for WMVS; BPET-940610KE for WMVT) for construction permits for minor modifications to the stations' facilities. The changes included relocation to a new tall foot tower to be constructed by MATC, in part at least to facilitate MATC's eventual construction of digital television facilities and thereby support the transition to digital TV.

The WMVS application was granted by the Commission on May 30, 1996 for a construction period through May 30, 1998.<sup>1/</sup> MATC thereupon diligently began the process of constructing the new tower and station facilities. Unfortunately, however, MATC encountered zoning and environmental issues during the local land use approval process for the new tower.<sup>2/</sup> In order to obtain approval of local authorities, MATC was required to modify the tower proposal in minor respects, including moving it a small distance (about .15 km) from the originally proposed site. Therefore, on November 19, 1997, MATC submitted an application to modify the CP to specify the new technical parameters. That application was granted by the FCC on July 16, 1998 (File No. BMPED-971119KI). Under then-existing policies, MATC was given six additional months, or until January 16, 1999, to complete construction.<sup>3/</sup>

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1/ Because of interference issues relating to the proposed DTV facilities of Station WJYS-TV in Hammond, Indiana, the WMVT CP was not granted by the FCC until December 16, 1998. For the reasons reflected in this petition, MATC does not anticipate any problem in constructing the WMVT modifications within the time frame now contemplated by the new Rules.

2/ The zoning process never resulted in a court appeal. Therefore, under the narrow and inflexible new Rules governing construction periods, the delay caused both by the process itself and the need to modify the tower proposal are not regarded by the FCC as constituting grounds for tolling or extending the construction period.

3/ On January 8, 1999, MATC filed an application on FCC Form 307 to extend the CP through August 31, 1999, when MATC anticipates that the project will be completed.

MATC thereupon began construction of the new tower. (It should be noted that, until July 16, 1998, MATC did not have all of the federal and local approvals necessary to construct; therefore it was unable to construct the tower sooner.) By the onset of severe winter weather several months ago (in Fall, 1998), MATC had erected the 1,200+ foot tower. However, because of bitter temperatures and high winds typical of a Milwaukee winter, MATC had to stop work on the tower before the "Star Mount" and the WMVS and WMVT antennas could be attached to the top of the tower and the transmission lines run from the antennas to the transmitters. MATC estimates that it will be able to resume work on the tower about May of 1999, with completion of the WMVS facilities by the end of August, 1999.<sup>4/</sup>

Under any reasonable view of the circumstances of this situation and application of appropriate public policy, MATC, which has proceeded diligently and at great investment of time and funds, should be able to complete the project and obtain for itself, its viewing public, and the public generally, the benefits of the new transmission facilities for WMVS, WMVT and their associated DTV stations. The problem for MATC, of course, is that, under the new Rules: (1) it is only entitled to an extension of the construction period until May 30, 1999, the date three years from the original grant of the WMVS CP; (2) no event has occurred that "tolls" the construction deadline, as the FCC apparently now accepts only natural disasters (not severe winter weather) and zoning court litigation (not other delays from local land use processes), among the myriad possible circumstances of delay and disruption, as constituting "tolling" events; and (3) there is no other process whatsoever, regardless of the dictates of the governing

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<sup>4/</sup> In the meantime, MATC is working on the transmitter site building, which should be completed by the time tower work can resume in May.

statute and the public interest, to obtain an extension of a CP.

MATC reasonably believes that, under the previous provisions of Sections 73.3534(b)(2) and (3) of the rules (the standards that were in place at all times material to this project until the new Rules were adopted in late 1998), MATC would be entitled to an extension because substantial progress had been made toward completion, the delay was for reasons beyond the control of MATC, and MATC has taken all reasonable steps to expeditiously resolve the problem and proceed with construction.

MATC also believes that the extension it seeks for WMVS would manifestly serve the public interest. Substantial public investment has already been made in the approval process, in acquiring equipment, and in the construction that has already taken place. Construction will be completed quickly once the weather again permits safe tower work. The delay in construction is attributable to causes beyond MATC's control, largely related to the zoning and environmental approval process for the construction, requiring a modification of the original construction permit. Finally, the new tower will provide a future home for WMVS and WMVT NTSC and DTV facilities, thus materially assisting the transition to digital TV in the Milwaukee market. The new tower will also be used by a number of FM stations.

MATC therefore requests reconsideration of the *Report and Order* insofar as it modified Section 73.3534 and added new Sections 73.3598 and 73.3599 that will, if applied as apparently contemplated, result in the forfeiture of MATC's construction permit for WMVS on May 30, 1999.

Reconsideration of the new Rules is required because they violate the statutory standards for construction permits imposed by Section 319(b) of the Communications Act, which requires

CPs be extended where construction has been "prevented by causes not under the control of the grantee." By artificially and arbitrarily limiting the definition of "causes not under the control of the grantee" to two specific circumstances (Acts of God and zoning litigation), the FCC ignores the plain dictates of its governing statute which requires extension for any matter outside the permittee's control. Surely, as here, where no construction can take place until local land use processes have been satisfied, and the permittee does all it can to satisfy such processes, any resulting delay is beyond the permittee's control regardless of whether the zoning process results in litigation. And just as surely, where severe winter weather precludes the topping off of a 1,200 tower and the installation of antennas and transmission lines, that weather is just as much outside the permittee's control as an "Act of God." The new Rules may have seemed tidy to the FCC in limiting the circumstances in which matters might justify tolling a construction period, but they surely do not state the entirety of circumstances outside a permittee's control, and they therefore violate the standards of the statute.

MATC further urges that reconsideration is necessary because its CP was awarded and it planned for and pursued the construction of the WMVS facilities in a manner that was fully consistent with the previous rule. Therefore, the application of the new Rules in a manner that would result in forfeiture of MATC's CP constitutes an unreasonable, *ex post facto* application of detrimental new standards in violation of MATC's rights of due process and proper administrative procedure.

For similar reasons, the new Rules violate the FCC's obligation to regulate in the public interest, convenience and necessity. No reviewing court could possibly find that the FCC will serve the public interest by requiring forfeiture of the construction permit for WMVS on May 30,

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1999, when 1,200 feet of steel stands on the tower site, a transmitter building is virtually complete, and all equipment necessary to complete construction is on hand. This is particularly true where MATC has shown that it was diligent throughout this process in seeking necessary authorizations and proceeding with construction.

Finally, as a matter of good public policy, MATC believes that reconsideration is required because, just as the new Rules do not appropriately recognize the circumstances justifying extended construction authority for WMVS, they also fail to provide appropriate flexibility for other permittees in their own unique circumstances. It is particularly appropriate to provide some mechanism by which noncommercial educational television and radio licensees can show the FCC that they have been diligent in proceeding with their construction obligations, but have been delayed for reasons beyond their control.

#### Conclusion

The FCC should reconsider the *Report and Order* by modifying the new Rules applicable to construction permits so that they satisfy the FCC's obligations under its governing statute, and fairly permit permittees extensions where they have been unable to construct for reasons beyond their control. The FCC should particularly consider and accommodate the special needs and circumstances of noncommercial educational television and radio stations in this process.

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Respectfully submitted,

MILWAUKEE AREA TECHNICAL COLLEGE  
DISTRICT BOARD

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